

From: Suzanne Jensen [suzanne@oewaves.com]
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To: restructure.sizestandards@sba.gov
Cc: 'Debra Coler'; 'Tracy Palermini'; 'Suzanne Jensen'
Subject: RIN 3245-AF22 - Small Business Size Standards; Selected Size Standards Issues
March 1, 2005

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Submitted by:
OEwaves, Inc.
1010 East Union Street, Pasadena, CA 91106
(626) 449-5000

OEwaves is a small business with 17 employees founded in the year 2000 to commercialize patented, ground-breaking opto-electronic technology discovered at the Jet Propulsion Laboratory (JPL), and licensed exclusively to OEwaves by Caltech (which manages JPL). We feel strongly that OEwaves is a prime example of the spirit of innovative, small business. Our success (and existence) would not be feasible without venture capital company (VCC) investment and government contracts enabled by programs such as SBIR.

Since our founding, OEwaves has raised over \$12 million from venture capital companies and over \$12 million through government contracts, including SBIR contracts with DARPA and MDA, as well as through other government programs such as the Advanced Technology Program (ATP). Given the revolutionary nature of our opto-electronic oscillator technology, venture capital companies have been eager to invest in our company, and yet to successfully realize our commercialization goal, their investment alone is simply not enough. Due to the potential impact our technology will have on military communications applications, agencies such as DARPA have also taken a strong interest in our success. The SBIR awards received by OEwaves have been critical in helping us achieve our technological milestones thus far. We have consistently met our SBIR deliverables and thus continue to move closer to achieving our product goals, which will dramatically impact a variety of military and commercial applications.

Before responding to the current advance notice of proposed rulemaking, OEwaves is compelled to comment on the most recent SBIR final rule which became effective on January 3, 2005. Under the new rule, the SBA now requires that an SBIR awardee must meet the following requirements:

It must be a for-profit business concern that is at least 51% owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States (as the regulations currently require); or

it must be a for-profit business concern that is at least 51% owned and controlled by another for-profit business concern that is at least 51% owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States.

OEWaves would like to comment on this rule since the new wording seems to now exclude a company such as ours, which we feel is not unlike many other innovative small businesses today, from participating in the program. The specific wording of the final rule appears to exclude eligible SBIR companies beyond what was intended by the spirit of the regulation by defining that an SBIR awardee must be 51% owned and controlled by “another for-profit business concern”. We propose the word “another” in the final rule be replaced with “one or more”, in order to include small businesses that are owned 51% or more by more than one for-profit business concern (so long as the for-profit concerns are at least 51% owned and controlled by one or more individuals). It is not uncommon for multiple VCCs to invest in a round of funding for small, start-up companies, so that no single entity or individual owns a majority share. Under the new rule, those companies, which still reflect the small business spirit of the program, are now eliminated from participation.

Following are OEWaves comments to issues raised in the advance notice of proposed rulemaking:

“SBA seeks public comments on whether it should provide an exclusion from affiliation with venture capital companies in determining small business eligibility for the SBIR Program, assuming such companies met the other eligibility criteria for the program.”

OEWaves feels that venture capital companies should be exempt from the affiliation rule provided they do not maintain “day to day” operating control of the small business. As stated earlier, VCC investment is critical to funding small companies with cutting-edge, new technologies such as ours that require a considerable investment in research and development in order to bring a product to market. VCCs are willing to assume great risk in return for the prospect of high financial gain and are responsible for the introduction and success of many new technological advancements in our country. An investment by a VCC, however, typically has little or no effect on the small business nature of a company. Companies such as OEWaves operate independently, despite the level of VCC ownership. Simply because a small business has VCC ownership, it does not necessarily have unlimited access to capital and resources. OEWaves therefore believes that the size standards should not apply to venture capital companies that are invested in small businesses, IF the venture capital company does not exercise “day to day” operating control of the small business.

“SBA seeks comments on approaches by which to grandfather small businesses that could be adversely impacted by a future restructuring. A related alternative may consist of a longer implementation date than the typical 30 day period to allow businesses to

adjust to the new regulations.”

OEwaves believes that small businesses already in the SBIR process – either with an SBIR proposal submitted, an SBIR award in contract negotiations, or an SBIR contract already in progress – should be automatically grandfathered in and not subject to new rules & regulations that would subsequently render them ineligible. We suggest that companies should be able to take advantage of new eligibility requirements immediately, however, if they were eligible under the old rules but for some reason not under the new rules, then they should have a one year grace period.

Suzanne E. Jensen
OEwaves, Inc.
1010 E. Union Street
Pasadena, CA 91106
www.oewaves.com
suzanne@oewaves.com
(626) 449-5000 x406